SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,

Petitioner,

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

PETITIONER'S REPLY BRIEF

Preliminary Statement

Respondents' argument will be here answered in the order made by them.

I

The Evidence Was Not of the Clear, Unambiguous, Unequivocal Quality Which the Government Must Produce in Order to Expatriate an American Citizen. (Reply to Respondents' Point I, pp. 16-26.)

A

The Trial Court Erroneously Treated the Burden of Proof As Being on Petitioner to Show No Expatriation Rather Than on the Government to Prove Expatriation

Respondents, while recognizing (p. 19) that the burden of proving loss of citizenship is on the government, are

incorrect in their assertion that the trial court recognized and understood this rule and that it correctly held the government to its burden.

It is true that at first the court seemed to recognize that the government had the burden of proving loss of citizenship.[1] However, it is manifest that, just as in a previous case the government attorneys had "sold" (R. 28) the court on a point of law, so had they succeeded in getting the court to incorrectly change its mind here. Thus at the time in the proceedings when the court was inquiring as to where lay the burden of proof (R. 20):

> "The Court: And whose burden is it to prove that he stayed out of the United States for the purpose of evading military service?"

the position of the government was that it was the plaintiff's (R. 20):

> "Mr. Grean: The plaintiff has that burden. The burden is on the plaintiff to prove his right to a judgment of nationality from this court . . ."

This was the precise position which the Court took when it came time for judgment (R. 33):

> "The Court: . . . I feel that the plaintiff failed to make a case here. I think that he has not established his citizenship. . . ."

With the court thus taking the erroneous view that the plaintiff, admittedly born in the United States (R. 7, 8), has the burden of "establishing" his citizenship, or conversely, that he has the burden of establishing that he has

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[1] R. 21: "The Court: . . . (H)aven't you a burden to prove that he has lost his citizenship."

not lost his citizenship, rather than the burden being on the government to establish that he has lost it, the error of the court in failing to properly appraise what evidence the government did present, is understandable and clear.

Before discussing the evidence, however, we turn our attention to the erroneous contention of the government (pp. 23-26) that in this type of case loss of citizenship can be decreed on the basis of admissions of a party alone without corroboration.

B

Out of Court Admissions Alone of a Party, Without Corroboration, Are Not Sufficient to Strip One of His United States Citizenship

The rule of law to be here discussed is important to the decision in this case because without the so-called admissions of petitioner,[2] there is no evidence in the case of any kind upon which to base even a conjecture that the operative facts required by Section 401(j) of the 1940 Act were present here.

The government concedes (pg. 26, f. n. 9) that in a criminal case, corroboration is necessary, but argues (*ibid*) that that rule is not applicable to civil cases, or at least not to this "civil proceeding" (Cf. Government's Brief in Opposition to Petition for Writ of Certiorari, pg. 6, where it also concedes that even in some non-criminal cases, corroboration is necessary). But considering the enormity of the punishment sought to be here visited upon petitioner, and the fact that the sanctions are penal and not civil, we submit that this is a type of "non-criminal" proceeding in which corroboration should certainly be required.

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[2] We will discuss below how even these so-called admissions do not measure up to the standard of proof required in a case such as this.

In *Barber* v. *Gonzales*, 347 U. S. 637, 642, this Court said that:

> "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' (citation) and should be strictly construed."

In *Bridges* v. *Wixon*, 326 U. S. 135, 154, the court said:

> "That deportation is a penalty—at times a most serious one—cannot be doubted."

The case at bar is one in which the government is calling for forfeiture, hence it is penal in nature (cf. Chairman Russell's argument during the debate in Congress on the section (Pet. Op. Br. 7) which makes it very clear that Congress was calling for and decreeing punishment) and the same considerations (there should be no error based on untrue confessions, the unreliability of even "voluntary" statements when made during the confusion of official interrogation, the experience of courts and their knowledge that a number of false confessions are voluntarily made) which impelled this Court to emphasize the rule in criminal cases (*Smith* v. *United States*, 348 U. S. 147, 152-154), are equally applicable here.

Citizenship is here in issue; this is a precious right. The sanction of criminal punishment—loss of liberty by being in jail—is for most, small hurt, compared with the greater punishment of loss of citizenship. Cf. Justice Jackson, concurring in *Edwards* v. *California*, 314 U. S. 160, 182 where he pointed out the protection given to Paul because of his Roman citizenship, and where he said that he supposed none of this Court "doubts that the hope of imparting to American citizenship some of this vitality was the purpose of" the declaration in the 14th Amendment

as to who are citizens. Cf. also, petitioner trying to impart the same thought to the Immigration Officers during their interrogation of him in 1952 (Exhibit "A", 24):

> "The law will punish a criminal and after he has been punished he has paid his debt to society. I feel that under the same conditions I should be punished and allowed to pay for my crime or whatever I am charged with."

Moreover, as the government has recognized (Br. in Oppos. to Certiorari, pg. 6), even in some civil cases corroboration is necessary. Wigmore on Evidence (4 (3d Ed.), § 1055 and 7, § 2075) refers to such issues as marriage, paternity, divorce, an alien applying for naturalization as being among them. Surely the evidentiary base for stripping away citizenship should be equally as strong as that required for an alien to become a citizen. This is especially so in view of this Court's decisions in *Schneiderman* v. *United States,* 320 U. S. 118, 125 and *Baumgartner* v. *United States,* 332 U. S. 665, 670 establishing the strict rule of governmental proof required.

The necessity for the rule that corroboration is required in this case is made the more clear when it is noted that the precise acts required for the operation of Section 401(j) are likewise made criminal under Section 11 of the 1940 Selective Service Act (50 USC Appx. 311).[2a] Thus, if corroboration is not required, it will mean that in a case where a greater penalty, not only can, but must be imposed, and in a case where a citizen is not protected by the safeguards of indictment, jury trial, etc., a lesser quantum of proof is required. We submit that such a state of the law is

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[2a] The corresponding sections in the law today are Sections 349(a)(10) of the Immigration and Nationality Act of 1952 (8 USC 1481(a)(10) and Section 12 of the Selective Service Act of 1948 (50 USC Appx. 462).

arbitrary and unreasonable and should not be permitted.

We do not believe that the government's suggestion (f.n. 9, pg. 26) that there is corroboration in the testimony at the trial has substance. In making this suggestion, the government blows both hot and cold, for the testimony at the trial completely negates the earlier statements. The government is in error, we submit, when it argues that the statements at time of trial corroborate the admissions made by petitioner before the Immigration Officers within the standards of this court's decision in *Opper* v. *United States,* 348 U.S. 84, 93. In that case this court said that the corroborative evidence the government must introduce must be "substantial" and that it must support the "essential facts" admitted. No such evidence can be gleaned from the testimony at the trial. The essential fact admitted by petitioner before the Immigration Officers, was that made at the hearing in 1947 where he said "yes" in response to the leading question (cf. *Nieto* v. *McGrath,* 108 F. Supp. 150, 154) "Do you admit that you remained outside of the jurisdiction of the United States from September 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land and naval forces of the United States?"[3] Nothing that petitioner said at the trial corroborated that admission. Indeed the trial court did not think so, but relied solely on the admission, not believing the testimony at the trial (R. 33), which negated in every way possible that "essential fact admitted."

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[3] As will be seen from the discussion, ante, of the statements before the Immigration Officers, it is significant that this was the only time petitioner made such an admission. Although at the first 1952 hearing (Exhibit A, p. 38) petitioner said "yes" in response to the question as to whether or not at the 1947 *and* 1950 hearings he had admitted that he remained outside the United States for the purpose of avoiding service, this was obviously an incorrect answer. For at the 1950 hearing (Exhibit A, p. 68), he said that he had so admitted at the 1947 hearing "but now I deny it."

C

Petitioner's statements before the Immigration and Naturalization Service were admissible for impeachment only, not as independent, affirmative, evidence

It is clear, of course, that if petitioner's statements before the Immigration Service are not substantive evidence, the government has not even the slightest proof in behalf of its case.

Respondents rely, *inter alia,* on 4 Wigmore § 1048 where the author approves the rule that prior admissions of a party are admissible as substantive evidence. The same author (Vol. 3 § 1018(b)) approves the same rule for prior contradictory statements of a witness,[4] but he takes pains to point out that:

> "The contrary view, (that such statements are not admissible as substantive evidence) however, is the orthodox one. It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent value.*"

In support of his statement of this *universal* rule, Wigmore cites many cases, including this court's decisions in *Southern R. Co.* v. *Gray,* 241 U.S. 333 and *Bridges* v. *Wixon,* 326 U.S. 135.

Moreover, even Wigmore, when he approves in Section 1048 of the admissibility of admissions of a party, warns

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[4] Respondents are in error in their suggestion (Br. 23) that petitioner is confusing the situation here with one where a statement is made by a witness not before the court. As Wigmore points out (Vol. 3, Pg. 688) he is talking about a witness who is before the court subject to cross-examination and where prior contradictory statement is sought to be used not only for impeachment but as affirmative evidence.

against using them as "*equivalent to affirmative testimony* for the party offering it." (Vol. 4, pg. 6.) And he calls attention to the opinion in *Gibson* v. *Boston*, 75 N.H. 405, 75 Atl. 103 as an example of the failure of justice that may occur when any stress is laid on the doctrine of admissions being "affirmative proof."

In explaining his dissent from the universal rule holding prior contradictory statements of a witness inadmissible as substantive evidence (in his first edition, he had previously approved of the orthodox view) Wigmore equated (f.n. 2, pg. 688 of Vol. 3) such a statement with that of an admission of a party.

We submit that because the facts of a case are to, or should, be proved in court, it is enough to permit the receipt of a prior contradictory statement of either a party or a witness for impeachment purposes alone, leaving the facts to be adduced before the tribunal and that just as this court will not permit a witness' prior contradictory statement to be used as affirmative evidence (*Southern R. Co.* v. *Gray*, 241 U.S. 333; *Bridges* v. *Wixon*, 326 U.S. 135; *Hickory* v. *United States*, 151 U.S. 303) so also should it not permit a party's, at least in a case such as this.[5]

D

The Government's proof does not rise to the standard required in this case

The mere fact (Govt's Br. 20) that "the government did not—and ordinarily could not—" produce evidence which is of a strong and convincing nature, not ambiguous and which would leave no troubling doubts, is no reason for relieving the government of its heavy burden. There is no

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[5] Cf. the trial court (R. 21): "(H)ow about taking a man's citizenship away from him on his own admissions. Would that be evidence?"

reason why, in a difficult case, the standard should be relaxed. Indeed, it is precisely because this court would not permit loss of citizenship save where the proof is clear, that it imposed the heavy burden in the first place.

It is manifest that neither court below nor respondents have given appropriate consideration to the facts and circumstances of this case. Not only do they brush aside the fact that petitioner had to stop school in rural Mexico at the age of 10,[6] when his father died (R. 8, 13), that he was the eldest of six children (R. 12); that he lived on a ranch supporting his mother and younger brothers and sisters (R. 13) doing agricultural work (Ibid); that he did not read a newspaper until he came to the United States (R. 13), that he had attended only two movies (Exhibit A, pp. 42-43), significantly, because his mother wouldn't give him the money to go; that he lived near a small town, in a mountainous and remote part of Mexico (Exhibit A, p. 77).

The parental compulsion which is clearly the reason for petitioner's not returning to the United States during his minority is brushed aside. But in this case, involving the deprivation of so clearly a constitutionally protected right as citizenship, the facts in the record surrounding this issue must be considered. (*Baumgartner* v. *United States*, 332 U.S. 665, 671; *Watts* v. *Indiana*, 338 U.S. 49, 51; cf. *Merchants National Bank* v. *City of Richmond*, 256 U.S. 635, 638; *Pierre* v. *Louisiana*, 306 U.S. 354, 358.) Especially does this parental compulsion become the clearer when it is considered that what we have here is a family, in which the father is dead, in a country where the family ties are of the strongest character. (See, Beals, "*America South*",

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[6] It is interesting to note the interpolation "(equivalent to about the sixth grade, U.S. school)." which appears as ostensibly being a part of petitioner's testimony before the Immigration Officers in 1952 (Exhibit A, p. 39).

Lippincott, 1937, pg. 303: "The family is really an overriding institution in Latin America.") For petitioner to have disregarded his mother's will is expecting too much. Under these circumstances, we do not believe it can reasonably be said that he acted voluntarily.

Even disregarding the testimony at the trial where petitioner sought in vain to have the court understand his predicament, and looking solely at his statements before the Immigration officers, we believe it will become clear that petitioner acted solely under parental compulsion and that it cannot be said he acted voluntarily.

From the very beginning, petitioner sought to convey to the Immigration service that he did not return to the United States before 1946 because his mother would not let him. Contrary to the trial court's understanding of the evidence (R. 33), this explanation by petitioner was not made first in court but was made before the immigration officers from the very first time he appeared and each time thereafter.[7] We set forth, at some length, portions of petitioner's statements before the Boards of Special Inquiry.[8]

The first interrogation was at El Paso, Texas on October 2, 1947:

Pg. 78:

> "Q. Then you were unwilling to serve your country during the years of the War prior to April 23, 1946?
>
> "A. No."

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[7] The trial court said (R. 33):

> "When a boy of that kind comes in and tells me his mother wouldn't let him out of the house, he couldn't come because his mother wouldn't let him out of the house, I don't know how such foolish statements can be made. . . ."

Thus the trial court failed to understand, not only petitioner's true motivation (it called it "foolish") but also where the statements were made.

[8] The references are to the pages in Exhibit A where the questions and answers appear. By correspondence with the Clerk of this Court, the pages in the Exhibit have been consecutively numbered.

Pg. 78:

"Q. Had it not been for your obligation to register in the United States, would you have come to this country during the years 1942, 1943, 1944 or 1945?

"A. I wanted to come to the United States in 1942 *but my mother would not permit me to do so.* I would have come to the United States in 1944 or 1945 had it not been for the requirement to register." (Italics added.)

The second hearing was at El Paso on September 28 and October 5, 1950:

Pg. 68:

"Q. Do you wish to make any other comment regarding this hearing of October 2, 1947?

"A. Yes. I would like to say that *if necessary I can produce my mother here to prove that she would not let me come.*" (Italics added.)

Pg. 68:

"Q. Why did you not obtain permission from your mother to come to the United States in 1943, 1944 or 1945?

"A. I asked her for permission but *she would not give it to me.*" (Italics added.)

Pg. 68:

"Q. According to your statement to the Board of Special Inquiry on October 2, 1947, you admitted that you remained outside of the jurisdiction of the United States from September 27, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the armed or naval forces of the United States. What do you have to say to that?

"A. Yes, that is true, but *I first stated that it was because my mother would not permit me to come;* then, I was told that that was not sufficient excuse. (Italics added.)

(Thus note how petitioner was trying to tell the inquiring officers that which they wanted to hear and which he thought would help his case. (Cf. *Ponce* v. *McGrath*, 91 F. Supp. 23, 24 where the court points out the "apparent desire to meet agreement and satisfy the questioner"). So here: petitioner first told the officers that it was because his mother would not permit him, that he did not come to the United States sooner. But when they told him this was not sufficient reason, and after they asked him the devastating leading question, he answered "Yes", obviously thinking that this is what the officers wanted him to say, which they did, and thinking that this was the answer which would help him.)

Pg. 68:

"Q. Why did you not come to the United States to serve in the armed forces of this country after you became twenty-one years of age on July 21, 1945."

"A. I did not have any money with which to move myself."

Pg. 68:

"Q. Do you admit that you remained outside of the United States from September 27, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land or naval forces of the United States?

"A. No. I do not admit that now."

Pp. 68, 69:

"Q. Do you admit that you previously told this Board that you remained outside of the United States from September 27, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land or naval forces of the United States?

"A. Yes. I admit that I stated that at that time, but now I deny it."

Pg. 69:

"Q. Do you admit that you remained outside the jurisdiction of the United States from September 27, 1944 until April 23, 1946 *to comply with the wishes of your mother* knowing that if you would come to the United States you would in all probability have to serve in the armed forces of this country? (Italics added.)

"A. Yes. I knew about that."

The third hearing was on January 9 and 194, 1952. At that hearing these questions were asked and these answers given:

Pg. 39:

"Q. What kind of work did you do in Mexico prior to entering the United States April 23, 1946?

"A. I worked for my mother, farming. We farmed our own parcel of land at the government farm."

Pg. 39:

"Q. Prior to your marriage in 1947, was there any one depending upon you for support?

"A. I had worked before 1946 with my mother farming and contributed to her support, as I lived with her always."

Pg. 40:

"Q. Were you not sufficiently close to El Paso, Texas, that you could have come to the United States prior to 1946?

"A. I explained all about that to the immigration officers at El Paso, Texas, when I was given my hearings. I admitted that I could and the reasons why I didn't—*because my mother didn't wish me to return to the United States* because I was helping support her there. And, *because of that reason, that's why I didn't do so.* I explained all that; they seemed to think that my only reason for not coming was because of being afraid personally of military service. That was not the reason, it was because of my mother's fear of that for me that I stayed there. Since I have come to the United States again, I have enlisted in the California National Guard Reserve. I have a letter here about that." (Italics added.)

Pg. 41:

"Q. Was fear of military service in time of war the only reason that you did not register for United States military training and service prior to 1946?

"A. The only true thing is and the only one I give now is my mother's fear of military service for me. I could have registered for it in Chihuahua, Mexico. I went there two or three times—the capital of the state. It was because of the fear of my mother that I did not do so before 1946."

Pg. 41:

"Q. Did you resolve to return to the United States prior to April of 1946?

"A. Yes, I had; *I had even asked her about my returning,* and told her I had wanted to return. *It was to obey her and her wishes* that I did not return before I did in '46 and during the war." (Italics added.)

Pg. 42:

"Q. Were you aware that you could have registered for United States military service in Mexico prior to 1946, had you desired to do so?

"A. Yes, sir. I later thought of registering for it in Chihuahua, Chihuahua, Mexico, where I went a few times, but as *my mother did not wish me to do so.* I did not do so." (Italics added.)

Pp. 42, 43:

"Q. Did you occasionally attend motion picture shows and go on pleasure trips from Favela to Chihuahua City, Mexico?

"A. I went there a number of times but I didn't go to motion picture shows there except on two occasions. There was a motion picture show in the village of Cuahtemoc close to us at Favela, but to go a distance cost money and *my mother wouldn't give me the extra money for that.*" (Italics added.)

Pg. 49:

"Q. Did you admit before the members of the boards of special inquiry when you were denied admission at El Paso, Texas, in October 1947 and in December 1950, that you had remained in Mexico subsequent to September 27, 1944, for the purpose of evading or avoiding training or service in the armed forces of the United States in time of war?

"A. Well, yes, I think I did. They asked me why I didn't come before 1946 and if I could have come, and if I knew about the war and if I knew I was supposed to come to register for military service. I told him the truth, that I knew all about it and that I didn't do it. I told him it was because *my mother was afraid* for me; *didn't want me to get in the war,* and I knew I should have done that—come to the United States while the war was going on, and that I could have come but I didn't do it. I admitted that but I didn't admit that I was afraid of the war at first. *They said they thought it was because I was afraid and not because my mother was afraid for me so I told them to put down whatever they like then;* maybe that was so. It didn't make any difference anyway because I knew I was supposed to come and I didn't do it." (Italics added.)

Pg. 55:

"Q. Were your statements before the boards of special inquiry of El Paso, Texas, on October 2, 1947, September 28, 1950, and October 5, 1950, true in all respects?

"A. Yes, sir, except that I hesitated to tell that my mother was afraid for me to give military service; that was the cause of my hesitation. *I was not afraid but she was afraid for me and I obeyed her wishes* and didn't do my duty, but I want to say now that I would do that now if I had the chance." (Italics added.)

A consideration of this testimony, taken as a whole, gives an entirely different picture from that conveyed by respondents' recital of the facts.

We submit that parental compulsion on a boy such as petitioner here is not to be lightly dismissed. Cf. *Mendel-*

sohn v. *Dulles*, 207 F. 2d 37 (CA DC 1953) for an example of where the court found that consideration for one's loved one was compulsive and did not render the person's conduct voluntary. That, too, was an expatriation case. The court there said (207 F. 2d at 39): "The Secretary's (of State) argument disregards the duress of devotion. Mendelsohn acted, it seems to us, under the coercion of marital affection, which was just as compelling as physical restraint."[9] See Sorrentino v. Dulles 226 Fed 243 (CA DC 1955)

Certainly the evidence does not comport with a view that petitioner stayed away because of fear for himself and in order to avoid military service rather than because of compliance with his mother's wishes. The record is clear here that petitioner enlisted—he did not await a draft—in the California National Guard in September, 1951[10] (Exhibit A, p. 40). At the time he enlisted he was told he might be subject to active service in the United States Armed Forces (Exhibit A, p. 19). This was precisely during the Korean War.

In the above excerpts we have not referred to the testimony at the trial itself. This, because we have endeavored to show and believe we have, that petitioner's lone admission in 1947 cannot stand up in the light of all the other questions and answers, to permit of a decree of expatriation.

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[9] It is noteworthy that in at least three other cases before the Immigration and Naturalization Service itself, (Matter of G— M—, 2 I & N Dec. 861, Matter of M, 2 I & N Dec. 910 and Matter of H— M—, 6603877, May 1947) persons who did not register with the American Consulate in Mexico or return to the United States, although they knew of the obligation so to do, were held not to have expatriated themselves under 401(j) because they stayed in Mexico to continue to support their families; this despite the fact, as in M—, for example, that the citizen had stated that he had voluntarily remained outside the United States to avoid training and service in the armed forces of the United States.

[10] He had registered the first day he came to the United States in April 1946 (Exhibit A, p. 76, 77).

Nevertheless, a reference to petitioner's testimony at the trial is not amiss, because it shows and tends to explain that all along petitioner was trying to tell the Immigration officers as well as the court that he did not come to the United States before 1946 because of his mother's control during his minority.

Thus the court asked petitioner (R. 9) "Why didn't you come before?" (1946) Petitioner answered (Ibid): "Because my mother don't let me."

When asked if he had answered in 1947 that he had known of the war since 1942, he again said *inter alia*, (R. 14): "I also answered that I wanted to come to the United States before but my mother did not permit me to leave the house."

At another time, petitioner said (R. 16):

> "There is a little confusion—something I want to get straight here. I also want to say that my mother wouldn't permit me to go out of the house. Wanted me to remain at home all the time."

And again, this between the court and petitioner (R. 17):

> "A. My intention has always been to come back to the United States when I was quite young but my mother wouldn't let me.
>
> "The Court: Was that your answer to the question of the Board?
>
> "The Witness: The answer is just the one I said from the beginning."

And (R. 18):

> "A. That is the question they asked me. The answer was that because my mother didn't let me and not because I was afraid of the war."

And (R. 19):

> "My answer that I gave at all times was that she did not want me to leave the house at any time."

And (R. 26):

> "My mother never mentioned anything about fear. The only thing she mentioned was she didn't want me to go out of the house."

While the trial court said (R. 33) he did not believe petitioner at the trial and that "his testimony before the immigration officers was far more accurate and more near the truth," in judging this testimony before the immigration officers, we believe but two conclusions are forthcoming. (1) that petitioner affirmatively showed that he did not act voluntarily and (2) that at the very least, the government's proof does not have the clear cut ring which it must and should have in a case such as this.

In *Perkins* v. *Elg*, 307 U. S. 325, 337, this Court, speaking through Chief Justice Hughes, said that

> "Rights of citizenship are not to be destroyed by an ambiguity."

In *Kawakita* v. *United States*, 343 U. S. 717, 728, this court refused to construe Section 401(d) of the 1940 Nationality Act "so as to provide treacherous ground for the loss of rights of citizenship."

In *Schneiderman* v. *United States*, 320 U. S. 118, 122 this court said that in an action concerned with "depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen."

We submit that the application of these principles to the evidence adduced by the government calls for decision in favor of petition.

As the Board of Immigration Appeals said in a case where it refused to find expatriation under section 401(j) (Matter of G — R —) 3 I & N Dec. 141, 154:

> "(W)here a person's conduct permits of two or more reasonable inferences, one unfavorable and the other or others favorable, we ought not to expatriate that person through a process of reasoning that gives no weight to the favorable inferences and that reaches the result by pyramiding one unfavorable inference upon another."

II

Section 401(j) of the Nationality Act of 1940, as Amended, Does Not Apply to the Facts of this Case. (Reply to Respondents' Point II, pp. 26-42.)

Respondents state (Br. 26) petitioner's position too broadly.[11] What petitioner is saying is that Congress did not intend and Section 401(j) should not be construed to apply to the facts of this case where a boy was taken as an infant by his parents to a foreign country, lived there all his life and complied with the laws of that country in relation to military duty in accordance with an agreement between this country and that pursuant to "the mutual desire of our respective countries to unite their efforts as members of the United Nations in prosecuting the war and achieving victory." (57 Stat. at 977) recognizing that such situations would arise and should be thus handled.

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[11] They are also incorrect in their assertion that petitioner did not make the point below. See R. 26, where petitioner's counsel argued: "What Congress had in mind was these people who departed from the United States during the war expected to remain outside until the war was ended."

Respondents seek to foreclose consideration of Congressional intent by reliance on that part of the language of the statute which says "or remaining." But, as this court has had occasion to point out (*Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479):

> " . . . Words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination." ' "

Respondents point to no legislative history contrary to, nor remotely modifying, that which petitioner has previously called to the attention of the court (Pet. Br. 20-22). Indeed the Immigration Service itself has called attention to additional Congressional statements which support petitioner. Thus, In the Matter of A — H —, II Administrative Decisions under Immigration and Nationality Laws of the United States (I & N Dec.) 390, 392, attention was called to the additional statement of Congressman Mason that "Anyone who *left* the country . . . would lose his citizenship." (Italics added.) Attention was also called (ibid) to Congressman Rowe's statement that "I understand by that that *if they are within the qualifying age* (for service in the armed forces) and an emergency exists, then it is determined that they *left* the country for that purpose." The decision also pointed out the additional statement of Senator Russell, chairman of the Senate Committee, concerning aliens:

> ". . . It (the bill) further provides that any alien who is subject to military service under the terms of the Selective Service Act, and who *left* this country to avoid military service, shall thereafter be forever barred from admission to the United States . . . This bill would de-

> prive *such persons* as are citizens of the United States of their citizenship . . . " (Italics added.)

Respondents characterize (Br. 27) these clear enunciations (and those at pages 20-22 of Petitioner's Brief) of the purpose of the bill as "more or less informal utterances in debate." But they are more than that; they are the explanation given to Congress by the Chairman of the Senate Committee which reported the bill favorably for passage and by the congressmen (Dickstein) who introduced the bill. And in addition respondents disregard the anything but "informal" letter of their then superior, the Attorney General of the United States, who was the one who asked for the legislation in order to get at those "many citizens of the United States who have *left this country* for the purpose of escaping service in the armed forces." (Italics added.) (Pgs. 2, S. Rept. 1075 and H. Rept. 1229, 78th Cong. 2d Sess.)

Moreover, in a decision interpreting the section (Matter of V— D—, 2 I & N Dec. 417, 424), the Attorney General on appeal said:

> "The act seeks to prevent an *exodus from* the United States for the purpose of avoiding military service . . ." (Italics added.)

This language of the Attorney General is the more significant by reason of two earlier decisions by the Board of Immigration Appeals (Matter of C—, 56175/45 (Feb. 23, 1945) and Matter of J—, 56172/580 (Nov. 2, 1945)) holding respectively that the expatriating provisions of the Act (H. R. 4257, 78th Cong.) do not apply to a citizen army deserter because at the time of his departure and staying out of the country he was not subject to the Selective Training and Service Act and that the exclusionary pro-

visions of the Act do not apply to an alien who at the time of his departure was not subject to the Selective Training and Service Act because he was a non-declarant alien under that Act. Certainly Matter of C, at least, applies here for petitioner was taken from this country at the age of 2.

Although respondents seek (Br. 28-36) to distinguish away the effect of the January 22, 1943 agreement between the United States and Mexico and though they do concede (Br. 35) that the agreement and Section 401(j) can be read harmoniously, the effect of their argument is to read the Agreement out of existence and to proceed as though it were not there.

The question is not, as respondents seem to believe (Br. 29, 32, 34), whether, by reason of the agreement, citizens living abroad were to be exempted from military control by this country. The agreement (Par. IX, thereof, the pertinent part of which appears at pages 23 and 24 of Petitioner's Brief; also f.n. 9, pg. 31 of Respondents' Brief) clearly contemplates that they were not. But this does not answer the problem. The point is that in strictly construing the expatriating statute, as must be done, is it reasonable to conclude, specifically as regards Mexico with whom the Agreement was made, that Americans who comply with what was contemplated by the Agreement, namely register for military service in Mexico, should lose their United States citizenship by not also returning to the United States for service.[12] Whether the lesser criminal penalty for failure to register in Mexico subsequent to Presidential Proclamation 2597, of October 23, 1943, could be visited is not necessary to decide. Certainly he could not lose his United States citizenship by reason of this one fact.

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[12] Incidentally, the facts concerning petitioner's registration for Mexican military service were not first brought out at the trial (R. 16) as respondents suggest (Br. 29). They were developed at the hearings before the Immigration Service (Exhibit A, pp. 41, 42, —).

Respondents speak of (Br. 28, 34) the supposed loss to the United States by petitioner's remaining outside the United States. But here again, they disregard the Agreement. It is to be remembered that the war was a United Nations endeavor, at least by the time the Agreement was entered into. Congress must be deemed to have known that there were many boys like petitioner here who had lived all their lives in Mexico and would be expected to perform their service with that country. Paragraph VI of the Agreement which provided for the interchange of information between the two countries as to the registration or induction of the respective nationals of the other country, was sufficient to protect our interests in the event we wanted to exercise the rights given us by Paragraph IX.

It is to be remembered that when petitioner did register for Mexican military service, he stated that he had been born in the United States (Exhibit A, pp. 44, 45). Presumably the Mexican authorities lived up to their Agreement under Paragraph VI and reported the fact of petitioner's registration to American authorities. There is nothing to indicate that we requested petitioner's release so that he might be inducted into the United States Armed Forces.

The spectre of loss to the United States of a wanted soldier is a non-existent fact raised by respondents, as is the "international problem" raised by them. The so-called international problem had been well provided for by the Agreement, and Congress must be presumed to have known of it and to have been content to let it rest there.

As to the loss to us of a soldier, this too is a hypothesis based on non-existent facts. As the cases cited in footnote 9, *supra*, demonstrate, where a person living in Mexico has no intention whatever of returning to the United States, but simply lives in Mexico because he wants to live there,

no contention is made that he lost his citizenship under Section 401(j). Yet the loss in manpower to the United States is the same.

With respect to the 21 year question, we believe that *McGrath* v. *Abo*, 186 F. 2d 766 (CA 9, 1951) cert. den. 342 U. S. 832, represents the correct law on the point. The ruling in the case at bar need not turn on a decision by this Court on the question, of course, because petitioner was away from the United States 9 months after he became 21. This fact, however, is important on the issue of voluntariness discussed above.[13]

III

Section 401(j) Is Unconstitutional. (Reply to Respondents' Point III, pp. 42-62.)

Respondents' grasp on "an implied attribute of sovereignty" (Br. 44) as authority for the right of Congress to impose loss of citizenship, misses the point. It may be conceded that each sovereign has the right to say who shall be citizens, who shall not and how, in accordance with its own law, that citizenship may be given up or even lost. But that does not solve nor reach the problem of this case. Each country exercises that right in accordance with its own institutions and laws. In this country this right of the sovereign has been exercised by the people in their Constitution when they said that persons born in this country are citizens of the United States. This is a complete and all inclusive status. The people have not delegated to Con-

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[13] We cannot refrain from pointing out respondents' lack of confidence in Congress' ability to accomplish the ends it seeks. No only would respondents have the Agreement between Mexico and the United States read out of existence, but they also attribute Congress' failure to amend section 403(b) of the 1940 Act to "oversight" and "forgetfulness". (Resp. Br. 41.)

gress [14] any power to change it, absent consent. If respondents are correct that Congress has the power, based on some theory of "implied" power, to impose loss of that status after its having been acquired, it would logically follow that it has the same "implied" power to prevent its acquisition in the first place, for the same "attribute of sovereignty" would be involved. We do not think that even respondents would, nor could they, if they would (*United States* v. *Wong Kim Ark,* 169 U. S. 649), contend that Congress has this latter power. Of course the nation is sovereign and has all the attributes thereof. However, the "Government is limited . . . by its own Constitution." (*Choctaw Nation* v. *United States,* 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 306, 315.)

Following respondents' theory of "implied attribute of sovereignty", we suggest that it is likewise such an attribute of sovereignty, for example, to provide for the mode of judicial trials. But we do not think that therefore it can be contended, in the face of the 6th Amendment, that Congress could impose trial without jury in a criminal case, absent consent.

Mackenzie v. *Hare,* 239 U. S. 299, is, of course, the case upon which respondents must and do rest.

But that case is distinguishable from the facts at bar. Or, if it is not, it is anomaly in present day law, a carry-over from a long forgotten past, and should not be followed today.

In the *Mackenzie* case the court agreed (239 U. S. at 311) "that a change of citizenship cannot be . . . imposed . . . without the concurrence of the citizen." It spoke of the statute (34 Stat. 1228) as dealing (239 U. S. at 312)

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[14] Cf. the delegation to Congress of the power "to establish an uniform Rule of Naturalization." (Art. I, sec. 8, cl. 4). See also *Lapides* v. *Clark,* 176 F. 2d 619, (CA DC 1949), cert. den. 338 U.S. 860.

"with a condition voluntarily entered into, with notice of the consequences." That may have been the case in the facts then before the court. The statute was enacted in 1907; plaintiff was born in California in 1909 and lived there all her life. It may well be that she concurred and had notice of the consequences. Certainly under the then prevailing law that when a woman marries, she merges her identity with the husband (239 U. S. at 311), it might with plausibility be said that she had notice that when she married an Englishman she "elected" (239 U. S. at 312) to expatriate herself. The same cannot be said of the legislation at bar, with respect to petitioner at any rate. While it may be that for the purposes of criminal law, petitioner can be presumed to have knowledge of the Selective Service Act passed in 1940, at a time when he had been absent from the country 14 years since he had been two years old, we agree with the Board of Immigration Appeals in Matter of G— R— (3 I & N Dec. 141, 149, f. n. 5) that "he, (n)or any other applicant, can (not) be charged with such knowledge for the purpose of determining whether or not he had lost his American citizenship under Section 401(j) of the Nationality Act of 1940, as amended."[15] Actual knowledge, of course, is out of the question on the facts of the case at bar. To the extent, therefore, that *Mackenzie* requires "notice of the consequences", the case supports petitioner.

Moreover, the rationale of Mackenzie is based on the "ancient principle" of "the identity of husband and wife." (239 U. S. at 311). This is an ancient principle which has outgrown its reason for existence, even as Congress recognized when it repealed this ground as a cause for expatri-

[15] The distinction is a profound one. For technical violation of the Selective Service Act, probation can be granted or a small fine imposed, or a pardon granted. For an act resulting in loss of citizenship, there is no reprieve, no middle ground. The loss is fatal, permanent.

ation in 1922 (42 Stat. 1022). We think that *Perkins* v. *Elg*, 307 U. S. 325 represents a departure [16] from the doctrine of the singleness of the wife and minor children with the husband and father, and we venture to suggest that if the *Mackenzie* case were presented to the court today, the ancient principle would not be suffered to take away Mrs. Mackenzie's birthright.

Furthermore, as will be seen below, the government has abandoned (Br. 57) the theory upon which *Mackenzie* and the other cases the government cites depend, namely the theory that by the doing of such and such an act the consent of the citizen, or his concurrence, can be spelled out, or implied. By offering its generalization (Br. 57) the government is contending for the bald proposition that the consent of the citizen is not necessary, that there need be no concurrence, that there need be no notice of the consequences. Its contention is simply that, like crime, Congress can impose punishment, only this time without the traditional safeguards.

Savorgnan v. *United States*, 338 U. S. 491 was an actual case of voluntarily taking on the allegiance of another country, renouncing (see pg. 495, n. 3) her American citizenship and taking up residence in the country of her choice. No question of constitutionality was involved. In *Moser* v. *United States*, 341 U. S. 41, 47 this court characterized Mrs. Savorgnan's actions and claim as simply "sign(ing) one thing and claiming another. To the extent that the dictum in *Savorgnan* stands for the proposition that consent and intent are irrelevant in expatriation cases, considerable doubt has been cast thereon by this court's decisions in *Moser* as well as in *Kawakita* v. *United States*, 343 U. S. 717, 727 where this court held that it was for the jury to deter-

[16] Despite its *dictum* (at 329) that Congressional action may result in loss of citizenship.

mine the fact as to whether petitioner there intended, by the various acts he performed to renounce his American citizenship.

We do not consider that petitioner's reliance on *United States* v. *Wong Kim Ark*, 169 U. S. 649, is misplaced. We agree that Judge McLaughlin correctly apprized the situation in *Okimura* v. *Acheson*, 99 F. Supp. 587, 590 where he said that the teachings of that case "seem to have been occasionally forgotten or whittled down." We believe there has been enough of that and that United States citizenship should be restored to the Constitution where the people put it.[17]

The necessity for this restoration is seen from respondents' candid assertion (Br. 48) that Congress has been increasingly concerned "with removing from the body of our citizenship those Americans who, by their voluntary acts, have shown that they *should* no longer be citizens of this country even if they desire to remain such."! (Italics added.) This is the crux of the matter. By what right has Congress, in the face of the clear mandate of the Constitution as to who "should" be citizens, to say that certain persons "should" not? Respondents' boot-strap argument

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[17] In *Terada* v. *Dulles*, 121 F. Supp. 6, 7 (DC Haw 1954) Judge McLaughlin, after citing the *Savorgnan* and other cases which seem to sustain Congress' power, said:

> "With due respect to the identify, age, and volume of authorities relied upon, I do not believe they correctly state the law. The error should not be further perpetuated. Below the surface, the real issue constantly overlooked is whether Congress has the uniiateral power to take away citizenship granted native-born by the Constitution itself. If it has not, may it find a voluntary renunciation by reading into the doing of such colorless acts as it may specify, today or tomorrow, a really non-existent intent or consent to forfeit a birthright? In brief absent the factor of consent of both the sovereign and the individual, is not native citizenship indestructible? If so, should not Congress confine itself, to punishing offending citizens for treason and lesser crimes?"

that since Congress has done it, hence it is valid, is of course, no argument at all.

Respondents make the issue clearer when they frankly (Br. 49) state that the enactments are "provisions for *compulsory* expatriation."[18] (Italics added.) This is the same thing as saying that one can compulsorily be deprived of the right to representation by counsel. The assertions are simply contrary to the Constitution.

Respondents' efforts (Br. 54-62) to spell out Congress' power to decree compulsory expatriation based upon "conditions of national moment," (Br. 56) only serve to emphasize Congress' lack of authority in this field. It is to be expected that whenever Congress passes public legislation, it does so because of "conditions of national moment." The road down which this argument takes us is illustrated by respondents' suggestion (Br. 57) that "lack of . . . support of this country" is sufficient to permit Congress to lower the ax of expatriation. Free speech considerations of the First Amendment aside, it may well be that in not supporting his country on a given issue, a citizen will be practicing the highest degree of citizenship. Whether he should be commended for this is beside the point. He cannot, certainly, be expatriated.

Respondents offer (Br. 57) a generalization as to the limitation on the power of Congress to impose expatriation and then they attempt to justify (Br. 61) the legislation here on the ground that "readiness to serve in the country's armed forces in time of war or emergency has always been

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[18] Rather than try to spell out some vague theory of consent to expatriation by the doing of this or that act. The American Civil Liberties Union, in its brief, *amicus curiae*, seems to make such a distinction in its argument that no such conclusion can be arrived at from the doing of the acts set forth in Section 401(j). This is really a 5th Amendment, Due Process, argument. We agree that the legislation is bad on that count, as well. But we believe that a decision of unconstitutionality on a broader base is called for.

a cardinal element of American citizenship." But so also has and is the readiness not to engage in narcotic traffic, or in assassination of government officials or in kidnapping and carrying across state lines, or in running away and resisting extradition, or in murdering, counterfeiting, smuggling, etc., etc. Congress should not be permitted to circumvent the constitutional safeguards offered those accused of crime, (indictment, trial by jury, etc.) by decreeing greater punishment by this so-called civil method. Merely being a bad citizen does not give Congress the power to say that he shall not be a citizen at all. Moreover, it is to be remembered that Congress has decreed loss of citizenship for doing acts which were for the benefit of this country (See *Acheson* v. *Kuniyuki*, 189 F. 2d 741, 190 F. 2d 987, cert. den. 342 U. S. 942). That traditionally the acts set forth in the statute have been regarded as cause for "severing the cords of (constitutionally endowed) allegiance," (Resp. Br. 62) (parentheses added) is not an impressive argument. (Cf. *United States ex rel Toth* v. *Quarles*, — U. S. —, 24 Law Week 4005, 4008, Nov. 7, 1955). It is the Constitution that controls here; not Congress.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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